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SERVICE DATE - MAY 28, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41298

ATLAS LIFT TRUCKS CHICAGO, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF HIGHWAY TRUCKING, INC. f/k/a TOTAL TRANSPORT, INC.

Decided: May 21, 1997

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Illinois, Eastern Division, in *Highway Trucking, Inc. f/k/a Total Transport, Inc. v. Atlas Lift Trucks Chicago, Inc.*, Case No. 93-C 1600. The court proceeding was instituted by Highway Trucking, Inc. f/k/a Total Transport (Highway or respondent), a former motor common and contract carrier, to collect undercharges from Atlas Lift Trucks Chicago, Inc. (Atlas or petitioner). Highway seeks undercharges of $11,159.80, plus interest of $2,430.57, allegedly due, in addition to amounts previously paid, for the transportation of six shipments of fork lift trucks and other equipment between March 14, 1990, and June 8, 1990. The shipments were transported between petitioner's facility in Schiller Park, IL, and points in California and Arizona. By order dated June 13, 1994, the court stayed the proceeding and directed petitioner to submit within 60 days of the order an administrative complaint to the ICC requesting resolution of the rate reasonableness issue.

Pursuant to the court order, petitioner, on August 10, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, rate reasonableness, and unreasonable practice. By decision served December 22, 1994, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on May 8, 1995. Respondent filed its reply on July 7, 1995. Petitioner submitted its rebuttal on July 24, 1995.

Petitioner asserts that the common carrier tariff relied upon by Highway to support its undercharge claims is a mileage-based tariff which under 49 CFR 1312.4(d) is void as a matter of law. Atlas further asserts that the rates that respondent is seeking to assess are unreasonable and that respondent's attempt to collect undercharges constitute an unreasonable practice under section 2(e) of the NRA.[2]

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Petitioner observes that respondent filed its complaint against petitioner in the U.S. District Court for the Northern District of Illinois on March 17, 1993, and that two of the subject shipments dated March 14, 1990, may be time-barred by the then applicable three year statute of limitations set

(continued...)

Atlas maintains that it negotiated an agreement with Highway under which Highway would transport its traffic at a flat rate ranging from $400.00 to $850.00. Petitioner contends that Highway transported the subject shipments and that Atlas paid the assessed flat rate charges in full. Petitioner supports its assertions with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consulting firm. Mr. Bange's affidavit includes among its attachments copies of the six balance due bills issued by respondent that reflect originally issued freight bill data as well as the "corrected" balance due amounts (Appendix A). A review of these bills indicates that respondent originally assessed Atlas flat rate charges ranging from $400 and $850 for transporting the subject shipments.

Highway's statement consists of legal argument of counsel.[3] Respondent maintains that petitioner has not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged or evidence that petitioner reasonably relied upon this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those which are the subject of this proceeding.[4]

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."

(...continued)
forth in 49 U.S.C. 11706(a). The shipment list attached to respondent's first amended court complaint (Bange Affidavit Exhibit B) includes two shipments dated March 14, 1990 (Pronumbers 2042 and 2043). The balance due bills for the two shipments (Bange Affidavit Exhibit A) indicate a shipment date of March 14, 1990, and a billing date of March 22, 1990. The original freight bill segment of the balance due bill for Pronumber 2043 also contains the marking "DELIVERED MAR 29 1990" stamped on the bill.

Under 49 U.S.C. 11706(g), a claim related to a shipment of property accrues on delivery or tender of delivery by the carrier. While it appears from the documentary evidence submitted that Pronumbered shipment 2043 is not barred by the statute of limitations, the record provides no basis for determining the delivery or tendered delivery date for Pronumbered shipment 2042. Therefore, we are unable to determine whether the claim for Pronumbered shipment 2042 is barred by the statute of limitations.

[3] Although respondent asserts that its statement consists of legal argument of counsel and the affidavit of R. E. Stulting, attached as Exhibit 1 to its reply, respondent's statement contains neither an Exhibit 1 attachment nor an affidavit from Mr. Stulting. Respondent's statement does include an Appendix A attachment, which contains the memorandum opinion and order of the court dated June 13, 1994.

[4] With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e), by its own terms, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Gold v. A.J. Hollander Co.* (In re Maislin Indus.), 176 B.R. 436, 443-44 (Bankr. E.D. Mich 1995); *Jones Truck Lines, Inc. v. Scott Fetzer Co.*, 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); *North Penn Transfer, Inc. v. Stationers Distributing Co.*, 174 B.R. 263 (N.D. Ill. 1994); *Allen v. National Enquirer*, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); cf. *Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

It is undisputed that Highway no longer transports property.[5] Accordingly, we may proceed to determine whether respondent's attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.[6]

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate.

Here, petitioner has submitted balance due bills indicating that the charges originally assessed by respondent were in conformity with the flat rates assertedly agreed to by the parties. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, Inc.--Rates and Practices of Best*, 10 I.C.C.2d 235 (1994) (*E.A. Miller*). *See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the flat rates originally billed by the carrier and paid by Atlas were rates agreed to in negotiations between the parties. The original freight bills issued by respondent for the subject shipments support petitioner’s contentions and reflect the existence of negotiated flat rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered by Highway to Atlas; that Atlas reasonably relied on the offered rate in tendering its traffic to Highway; that the negotiated rate was billed and collected by Highway; and that Highway now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Highway to attempt to collect undercharges from Atlas for the shipments at issue in this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

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[5] Respondent in its answers to petitioner’s request for admissions and accompanying interrogatories dated July 21, 1992, submitted in the court proceeding, acknowledges that it has ceased motor carrier operations (Bange Affidavit Exhibit G at 2, 10, 12, 17, and 19).

[6] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

2. This decision is effective on May 28, 1997.

3. A copy of this decision will be mailed to:

The Honorable Rebecca R. Pallmeyer
United States District Court for the
Northern District of Illinois,
Eastern Division
219 South Dearborn Street
Chicago, IL 60604
Re: Case No. 93 C 1600

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary